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QUESTION PRESENTED

Whether this Court's holding in *Cannon v. University of Chicago*, 441 U.S. 677 (1979) should be broadened so that a participant in a federally assisted educational program who has alleged an intentional violation of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.* (1988), may obtain not only equitable relief, but recover compensatory, general and punitive damages as well?

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IN THE

Supreme Court of the United States

October Term, 1991

No. 90-918

CHRISTINE FRANKLIN,

Petitioner,

vs.

GWINNETT COUNTY SCHOOL DISTRICT and
DR. WILLIAM PRESCOTT,

Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit**

BRIEF FOR RESPONDENTS

STATEMENT OF CASE

This case concerns the scope of the remedy available to a victim of sex discrimination under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq*. Respondents have but three qualfications to make to Petitioner's summary of the facts and proceedings below.[1]

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[1]Due to the disposition of this case below on a motion to dismiss, the preparation of a joint appendix was unnecessary. Respondents will cite to the Appendix contained in Franklin's Petition for a Writ of Certiorari when they refer to the decisions of the Eleventh Circuit or the Northern District of Georgia. References to the complaint, which was the sub-

First, although the underlying charge made by the Petitioner in her complaint alleged a pattern of sexual harassment, the details — as disturbing as they are — have no analytical or substantive significance for the resolution of the legal issue presented.

Second, although Petitioner originally demanded injunctive relief prohibiting the school system and its employees from "harassing or intimidating" her, Comp. para. 57, she abandoned that request when Respondents filed their motion to dismiss.[2] Respondents suggest, therefore, that certain factual and remedial matters are out of the case: (1) As a result of actions taken by the Gwinnett County School System after April 1, 1988, including actions taken in response to the investigation by the Office for Civil Rights of the Department of Education, Petitioner's educational environment was effectively purged of any continuing effects of the sex discrimination that Petitioner may have suffered; (2) If Petitioner experienced any educational detriment necessitating remedial instruction or emotional counseling — both of which would be within the ambit of equitable relief — no such detriment was alleged or equitable relief sought. To the extent that Petitioner seeks damages, the purpose of such a recovery would be something other than

ject of the dismissal order now before this Court for review, will be to the appropriate paragraph number or, in the case of the compliance letter issued by the Office for Civil Rights on December 14, 1988, to the appropriate page in the letter. The Solicitor General advised Respondents that a copy of the complaint in this case has been lodged with the Clerk.

[2]In her order of May 1, 1989, dismissing the complaint in this case, Judge Orinda D. Evans noted that "[p]laintiff argues that the only real issue before the court is whether compensatory relief is available." Pet. App. at 17. This concession came in response to a suggestion of mootness, Pet. App. at 16-17, prompted by the resignation of the accused coach and the school system's implementation of a grievance system to receive and consider student complaints about sexual harassment and other Title IX issues. Ex. A at 8-9.

restoration to an educational environment free of sex discrimination or its lingering effects.[3]

Third, in discussing the remedy sought under Title IX, the Petitioner refers to "damages", "compensatory damages", "compensatory remedy", "compensatory relief", "monetary relief", "all appropriate, traditional forms of judicial relief" and "the usual remedy of damages" to describe what is at stake. The Petitioner's complaint, in fact, asks for "compensatory, general and punitive damages. . . ." Comp. para. 57. Each of these categories, but particularly punitive damages, is discrete, with different remedial objectives, different measures of damages and differing, frequently hard-to-predict, effects on the educational institutions subject to ultimate liability under Title IX. Respondents emphasize this point because of the Petitioner's fundamental assumption that remedies for federal statutory violations, apart from addressing the interests of a plaintiff, are otherwise of such limited consequence that Congress commonly leaves questions of remedial content and scope to the courts.

SUMMARY OF ARGUMENT

If the allegations in her complaint are proven, Petitioner would be entitled only to equitable relief under Title IX of the Education Amendments Act of 1972, 20 U.S.C. § 1681 *et seq.* Title IX makes no reference to a private judicial right to recover the compensatory, general and punitive damages that Petitioner requests in this case. Petitioner has the burden of establishing a statutory basis for the recovery she seeks in

[3]Damages could compensate for economic loss or wounded feelings or they could serve to punish the Respondents for misconduct of an aggravated nature. The jury would determine all awards. However once the jury awards damages, there is no assurance that any of it must be spent to promote a successful Title IX plaintiff's future education.

this case, *Bell v. Hood*, 327 U.S. 678 (1946) notwithstanding. Because the plain meaning of the text of Title IX does not authorize a damages remedy, this Court should not read such a remedy into the statute. Not only is Title IX silent on the remedy Petitioner seeks, the legislative history is silent as well except for a single reference to a defeated proposal for equitable relief advanced during the debate over the enactment of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d). Established law in 1964 and in 1972 generally precluded monetary liability against state and local governments and it is highly unlikely that Congress would have overturned such settled precedent without mention in floor debate. Moreover, equitable relief is more appropriate than damages to accomplish the dual objective of the federal role in education: (1) fostering learning and (2) eliminating discrimination based on sex, race and other impermissible factors in the school environment. Equitable relief seeks to promote compliance and to maintain institutional relationships; damages function primarily to punish and tend to stimulate institutional resistance. Respondents ask the Court to reject Petitioner's argument to extend *Cannon v. University of Chicago*, 441 U.S. 677 (1979).

ARGUMENT

I. Introduction

Petitioner asks this Court to enlarge upon its ruling in *Cannon* and declare that a participant in, or beneficiary of, a federally assisted program has under Title IX a right to recover "compensatory, general and punitive damages." Title IX is one of several congressional enactments based on the conditional spending power.[4] All such enactments trace their origins to the anti-

[4]Other legislation includes § 504 of the Rehabilitation Act of 1973, 87 Stat. 394, 29 U.S.C. § 794 (1988); § 601 of the Civil Rights Act of 1964,

discrimination provisioins of Title VI of the Civil Rights Act of 1964.[5] In the twenty-seven years since the passage of Title VI, this Court has never interpreted the anti-discrimination provisions of any of those statutes to support a recovery for the range of monetary damages that the Petitioner now seeks.

For reasons that will be developed in greater detail, Respondents believe that Petitioner asks for a more extensive change in the law than her argument — with its incrementalist rhetoric — tends to convey. To illustrate, Petitioner wants this Court to authorize monetary remedies under Title IX that she could not secure under 42 U.S.C. § 1983, a statute that directly applies to this case and allows the full panoply of common law damages remedies.[6] Beyond that, Petitioner

78 Stat. 452; 42 U.S.C. § 2000d (1988). The interrelatedness of these statutory schemes is a key theme in this Court's decisions. *See Cannon v. University of Chicago*, 441 U.S. 677 (1979); *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582 (1983). Indeed, the decisions in both *Cannon* and *Guardians Ass'n* regarded the legislative history of Title VI of the Civil Rights Act of 1964 to be pivotal to an understanding of the rationale and scope of all contemporary anti-discrimination legislation based on the conditional spending power.

[5]78 Stat. 452, 42 U.S.C. § 2000d (1988).

[6]To grasp the full dimensions of what Petitioner wants as a Title IX remedy, consider how the present case would be analyzed if brought under 42 U.S.C. § 1983. Note the doctrinal barriers that the Title IX theory seeks to evade:

(1) The recovery of punitive damages against the school district would be foreclosed because of this Court's decisions in *City of Newport v. Facts Concert, Inc.*, 453 U.S. 247 (1981).

(2) To the extent that Petitioner's complaint suggests reliance on *respondeat superior* theory, that theory is also foreclosed against the school district by this Court's decision in *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978).

(3) To have any hope of establishing governmental entity liability against the school district, Petitioner would have to show an official policy condoning or tolerating sexual harassment and further show that the policy

asks the Court to minimize the significance of statutory silence under Title IX on two relevant levels — both on the question of right as well as the question of remedy. The question of implied right having been settled in *Cannon*, Petitioner argues that her burden of proof concerning intent has been discharged. From this vantage point of analytical strength, Petitioner would bypass the vexing problem of second level statutory silence on implied remedy by ***presuming*** under *Bell v. Hood* that Congress routinely expects the full panoply of common law damage remedies to be available to enforce all implied rights of action.[7] A defendant faced with this formidable presumption can avoid damages liability only if congressional intent to limit the remedy is demonstrated — a seemingly impossible task that makes the Petitioner's presumption rebuttable in theory though not in fact.[8] Respondents hope to show

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was fashioned by a final decisionmaker at the policy making level within the school district. *City of Canton v. Harris*, 489 U.S. 378 (1989); *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988); *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986). On this point, if Respondents read the Title IX complaint correctly, it does not appear to implicate any school official in the school district higher than the principal of North Gwinnett County High School. Recently decided and, in Respondents' view, well considered circuit court decisions suggest strongly that Petitioner would fail if she proceeded against the Respondent school district under section 1983. *See, e.g., Thelma D. by Delores A. v. Board of Educ.*, 934 F.2d 929 (8th Cir. 1991); *D.T. by M.T. v. Independent Sch. Dist. No. 16*, 894 F.2d 1176 (10th Cir. 1990); *Stoneking v. Bradford Area Sch. Dist.*, 882 F.2d 720 (3d Cir. 1989); *Spann by Spann v. Tyler Indep. Sch. Distr.*, 876 F.2d 437 (5th Cir. 1989).

Finally, for the record, Petitioner did bring a § 1983 action in state court *after* the adverse ruling in the District Court on her Title IX claim. The § 1983 claim was dismissed on res judicata grounds. *Franklin v. Gwinnett County Pub. Schs.*, ____ S.E.2d ____, 1991 WL 155140 (Ga. App. 1991).

[7]In this regard, Petitioner also relies on *J.I. Case v. Borak*, 377 U.S. 426 (1974).

[8]Since Congress never debated, much less legislated, with respect to either of these issues in connection with the adoption of Title IX or its

that Petitioner's arguments are ahistorical, unreasonable and without a sound appreciation for the constraints on statutory interpretation that flow from the plain meaning of language, the requirement of fair notice to all who are subject to regulation and the concept of separation of powers.

Although some of the arguments to be advanced on Respondents' behalf would challenge the premise of the implied right of action cases generally, Respondents do not ask the Court to abandon *Cannon*. They ask rather that the remedy available to successful Title IX plaintiffs be limited to equitable relief. The purpose of this relief would be to restore such plaintiffs to the status within the educational program they would have achieved had the discrimination never taken place. Respondents' contend that equitable relief: (1) is as effective, if not more effective, than a damages remedy in eliminating sex discrimination; (2) strikes a better balance between the dual goals of funding education and trying to prevent sex discrimination in the schools; (3) costs less than the damages remedy; and (4) does not engender the siege mentality that can arise in cases in which a substantial damages claim is made. In making these points, Respondents do not intimate that general policy analysis should decide this case. Rather, these reasons offer powerful support to what ought to be a straightforward question of statutory interpretation.

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direct antecedent, Title VI, how likely is it that a defendant could meet the burden of proof that the Petitioner describes? The probability, of course, is quite low which is why the burden of shifting argument is so attractive from the Petitioner's perspective. Without this analytial construct, the Petitioner's case lacks pretense because Petitioner cannot cite statutory text to support her request for an implied damages remedy.

II. Neither the Text Nor the Structure of Title IX Authorizes A Private Right of Action to Recover Compensatory, General or Punitive Damages.

This case presents an important question about methodology of statutory interpretation. Not content with the equitable remedy recognized in *Cannon v. University of Chicago*, 441 U.S. 677 (1979), and reaffirmed in *Guardians Ass'n v. Civil Serv. Comm'n.*, 463 U.S. 582 (1983), and *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624 (1984), Petitioner asks this Court to fashion a broad right to damages under Title IX, notwithstanding total statutory silence in Title IX (and its statutory antecedent Title VI) on the subject. Petitioner seeks an interpretation of Title IX that would distort accepted standards of statutory interpretation (including legislative history). For that reason alone, it should be rejected. To the extent that Petitioner argues for broad judicial authority to formulate remedy whenever a right is found, this argument also offends the principle of separation of powers. This provides an independent basis for affirming the ruling of the Eleventh Circuit.

A. The Plain Meaning of Title IX

1. Doubts About Implied Right of Action Theory Raised by a Majority of Justices in *Cannon* Decision

When this Court recognized an implied private right of action under Title IX in *Cannon*, three Justices (White, Blackmun and Powell) dissented. For them, the argument favoring recognition of an implied private right went beyond the limits of statutory interpretation even when liberally supplemented by reference to legislative history. Justice White's dissent reviewed the 1964 congressional debate about Title VI in detail

because Title IX was premised on the Title VI ban on race, color or national origin discrimination in programs receiving federal financial assistance. 42 U.S.C. § 2000d. Justice White found that Title VI was enacted to make clear that all federal agencies had both the duty and the authority to eliminate discrimination in federally assisted programs. *Cannon*, 441 U.S. at 718-721. In his view, Title VI contemplated agency action to be the "principal mechanism" for enforcement. *Id.* at 721. To the extent that private enforcement through litigation was foreseen, Congress understood that such litigation would be against persons acting under of color of state law and would be brought under 42 U.S.C. § 1983. *Id.* 722-724.

Justice Powell accepted the reasoning of Justice White's dissent. He went further, however, to question the Court's entire approach to statutory interpretation in the implied right of action cases. He viewed the Court's role (in recognizing implied rights of action) as raising a significant separation of powers issue. *Id.* at 730-731. In this vein, Justice Powell was particularly critical of the four part test enunciated in *Cort v. Ash*, 422 U.S. 66 (1975), a test that he viewed as inviting "independent judicial lawmaking". *Id.* at 740. Indicating that he would prefer to start afresh without the trappings of *Cort*, he stated:

> Henceforth, we should not condone the implication of any private action from a federal statute absent the most compelling evidence that Congress in fact intended such an action to exist. Where a statutory scheme expressly provides for an alternative mechanism for enforcing the rights and duties created, I would be especially reluctant ever to permit a federal court to volunteer its services for enforcement purposes. *Id.* 749.

Two Justices in *Cannon* concurred in the decision to imply a private right of action under Title IX, but expressed serious

reservations about the direction of the law. Justice Rehnquist, joined by Justice Stewart, saw the implied right of action question as being one ultimately of statutory construction.[9] Although giving the benefit of the doubt to Congress' apparent assumption about the primacy of the judicial role in defining and enforcing civil rights, Justice Rehnquist made clear that the time to draw the line was at hand. Referring to Justice Stevens' concluding call for Congress to follow the "better course" of making clear its intent to create a cause of action, *Id.* at 717, Justice Rehnquist advised the "lawmaking branch of the Federal Government that the ball, so to speak, may well now be in its court." *Id.* at 718. Respondents suggest that in the present case the time has come to make the call.

2. Text, Structure and Meaning of Title IX

The language of Title IX, like its statutory antecedent Title VI, says nothing about either a private right of action or any form of monetary relief. The legislative history of Title IX, like that of Title VI, is likewise silent on those subjects. The Title IX enforcement mechanism was drawn from Title VI, and yet both contrast sharply with the judicially enforceable remedial schemes set forth in other titles of the Civil Rights Act of 1964, none of which make the common law damages remedy available.[10] From a structural standpoint, Title IX rests on the conditional spending power rather than the commerce clause and this alone suggests a less intrusive, less coercive regulatory approach. Under Title IX (and Title VI) a high premium is placed on sustaining the funding relationship and retaining the federal government's capacity to influence and persuade.

[9]This principle was upheld in *Touche Ross & Co. v. Redington*, 442 U.S. 560, 575 (1979), a case decided in the same Term as *Cannon* but after *Cannon* was announced. It was reaffirmed in *Virginia Bankshares, Inc. v. Sandberg*, ___ U.S. ___, 111 S.Ct. 2749, 2763 (1991). Respondents suggest that this principle offers a powerful antidote to Petitioner's *Bell v. Hood* presumption that ultimately is an anti-textual argument.

[10]The Civil Rights Act of 1964 establishes enforcement procedures in several titles: Public Accommodations (Title II), Public Facilities (Title III), Public Education (Title IV), Federally Assisted Programs (Title VI), and Employment (Title VII). Note that Title II, 42 U.S.C. § 2000a-3, and Title VII, 42 U.S.C. § 2000e-5, authorize equitable relief (including back pay in Title VII) in civil actions, while Title III, 42 U.S.C. § 2000b-(a), and Title IV, 42 U.S.C. § 2000c-6, permit the Attorney General to institute civil suits to "further the orderly process of desegregation."

Title VI, 42 U.S.C. § 2000d-1 mentions only administrative procedures for the cut-off of federal funds to offending programs and activities. It is silent on the issues of a private cause of action and private remedies. The Court, however, implied a private cause of action for equitable relief in *Cannon* which is at least consistent with the explicit remedies in the other titles of the Civil Rights Act of 1964. In Respondents' view it would be anomalous for the Court to interpret statutory silence in Title IX as permitting a damages remedy that would go beyond those explicitly mentioned in the source legislation.

The equitable remedy authorized in *Cannon* at least has the virtue of reinforcing the linkage between the federal government and recipients of federal financial assistance. The litigant in effect becomes an additional bargainer in an ongoing relationship between the federal agency and the educational institution. If the litigant believes that more ought to be done to comply with Title IX — namely to change institutional behavior — she can invoke the equitable authority of the district judge. The object is not to punish but to find the optimal level of Title IX compliance.

An irony of Petitioner's argument for damages under Title IX is that the intense personal vindication she seeks for herself would have little or no benefit for her classmates. Equitable relief — whether achieved by agency intervention or by court order — almost always insures that the remedial benefit to the individual benefits others. The present case is good example. Recall that the football coach and the band

teacher both left their positions at the high school. They were no longer in positions of authority from which they could exploit or intimidate female students. Recall also that the Title IX grievance procedure came as a result of the intervention of the Office of Civil Rights. Other female students in Petitioner's position in the future will now know where and how to get help.[11] Perhaps a greater irony is that if Petitioner gets the damages remedy she seeks, her personal vindication actually might diminish her classmates' protection against discrimination in the long run. Where will Petitioner and her classmates be if the costs and uncertainty of defending Title IX damage actions influence school systems to decline federal financial assistance in the years ahead?

The text, structure and established administrative oversight practice under Title IX weigh powerfully against the judicial implication of a damages remedy for Title IX violations. As will be shown, this Court's recent discussion of the methodology of statutory interpretation supports Respondent's position. Respondents do not think that it is necessary to go beyond the text of Title IX. Should the Court wish to consider legislative context, however, Respondents demonstrate elsewhere in this brief that the silence about the damages remedy during legislative debate is unanswerable. If the supporters of Title IX (and its antecedent Title VI) thought about private enforcement at all, they apparently did not think about making "compensatory, general and punitive" damages available to the successful Title IX (or Title VI) litigant.

[11]Because the compliance efforts of the school have been extensive and effective, Petitioner's request for injunctive relief probably would have been deemed moot even if it had not been abandoned. *DeFunis v. Odegaard*, 416 U.S. 312 (1973). In contrast to requests for equitable relief, damages claims are never moot. *Los Angele v. Lyons*, 461 U.S. 95 (1982). If anything, a damage claim tends to prolong litigation and to increase bitterness, particularly where the litigants had a prior institutional relationship.

3. Plain Meaning Doctrine Applied To Title IX

This Court has never suggested that interpreting statutes is a mechanical process which excludes reference to legislative history or other relevant materials. On the other hand, concern about the proper role of the judiciary in interpreting statutes has prompted the Court in recent years to give greater weight to text, structure and plain meaning. Respondents believe this trend is appropriate and that it weighs heavily against the Petitioner's burden shifting argument under *Bell v. Hood*, 327 U.S. 678 (1946).

An illuminating example of this is the Court's decision in *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504 (1989), a civil case involving the scope of impeachment under Rule 609(a) of the Federal Rules of Evidence. This case is important because it arises in an area of the law — judicial rulemaking — where the Supreme Court's institutional competence is at its greatest and where Executive and Legislative Branch deference to its expertise is substantial. 28 U.S.C. § 2076. In holding that Rule 609(a) permits impeachment by prior conviction of all witnesses in civil or criminal trials (except the *criminal* defendant) without balancing prejudice against probative value, the Court eschewed interpretive options that would have improved or perfected the rule in the eyes of its critics. As Justice Stevens observed:

> Our task in deciding this case, however, is not to fashion the rule we deem desirable but to identify the rule that Congress fashioned. We begin by considering the extent to which the text of Rule 609 answers the question before us. Concluding that the text is ambiguous with respect to civil cases, we then seek guidance from legislative history and from the rules' overall structure. *Id.* at 1984.

As unsatisfactory as the Court's reading of Rule 609(a) might

have been to some, it did come closest, among all of the interpretive possibilities, to what might be described as the plain meaning of the rule. The decision in *Green* probably would not have caused much alarm if the Court had shed its judicial mantle and revised Rule 609(a) to eliminate its significant drafting flaws. The Court, however, did not do so and the established process of amending the Federal Rules of Evidence was allowed to take its course. Now Rule 609(a) has been rewritten, hopefully for the better, but only after Congress had the opportunity to review and object as provided in 28 U.S.C. § 2076.[12]

Green is a worthy example of restraint in statutory interpretation. A reluctance to delve into every statutory drafting deficiency is not an abdication of judicial responsibility. As a practical matter, the constraints of case-by-case adjudication greatly limit what a court can do at any one time even if it wants to engage in corrective statutory interpretation. Subsequent decisions, sometimes several of them, are almost always necessary to deal with the full implications —foreseen and unforseen — of the corrective interpretation.[13] These constraints, however, do not limit the

[12]In a similar vein, see *Finley v. United States*, 490 U.S. 545 (1989), where this Court rejected an attempt to assert pendent party jurisdiction in a Federal Tort Claims Act case, 28 U.S.C. § 1346(b). As in the case of Rule 609(a), the decision in *Finley* was overturned legislatively. § 310, Judicial Improvements Act of 1990; codified at 28 U.S.C. § 1367. The point is that adhering to the normal processes of lawmaking settles questions in a way that judicial construction cannot match.

Petitioner's *Bell v. Hood* argument invites this Court to engage in an interpretative venture where its institutional capacity to make judgments is less than Congress'. In light of *Green* and *Finley*, Petitioner's argument surely cuts against the grain.

[13]When a damages remedy is recognized judicially, the following issues may well have to be resolved at some point, particularly if the liability of public officials or governmental entities is involved: (1) Does damage include a recovery for wounded feelings? Or only economic injury? (2) What is the measure of damages? (3) Are punitive damages recoverable? (4) What is the measure of punitive damages? (5) Does the damage recovery vary depending on the degree of culpability involved? (For example, disparate impact versus disparate treatment theories as discussed in *Guardians Ass'n*) (6) What immunities are applicable? (7) What is the standard for recognition of an immunity claim? (8) If the plaintiff dies before bringing suit or before judgment, does the action survive? (9) If the victim dies as a result of a discriminatory act (such as a racially or sexually motivated killing in the school environment), does the federal action survive? What law governs? (10) What statute of limitation governs? Can it be applied retroactively? and (11) When a governmental entity is sued, can it be held liable on a respondeat superior theory?

When the consequences of implying a right of action and recognizing an accompanying damages remedy are examined closely, a court must be prepared to go the long haul to address all of the *anticipatable* problems. If the remedy is limited to equitable relief, the post-recognition problems are fewer and more manageable.

legislative or formal rulemaking processes and, therefore, when either process is stirred to action, the end result may well be a statutory proposal that addresses several related problems simultaneously and does so far more effectively than a court could ever hope to do. The reasoning and result in *Green* counsel strongly against recognition of a damages remedy under Title IX in the present case.

Three cases from the 1990 Term provide additional guidance in this case. In *West Virginia Univ. Hosp. Inc. v. Casey*, ____ U.S. ____, 111 S.Ct. 1138 (1991), the issue was whether a successful section 1983 plaintiff could recover more than $100,000 in fees for experts employed in the course of litigation. This Court in a 6-3 decision concluded that such fees were not included within the term "a reasonable attorney's fee" as contemplated by 42 U.S.C. § 1988. After reviewing many *statutes* authorizing the award of fees and expenses to the prevailing party in litigation, the majority in *WVUH* found that attorney's fees and expert witness fees were routinely treated as separate items and yet were still within the same class of

litigation expenses. *Id.* at 1141-1143. The majority's analysis of *cases* discussing the fee shifting issue yielded the same conclusion. Given the common legal derivation of these related items, the absence of any express reference to expert witness fees in section 1988 was decisive to the *WVUH* holding.

In response to an argument that congressional purpose can overcome apparent deficiencies of statutory text, the Court had this response:

> The best evidence of . . . purpose is the statutory text adopted by both Houses of Congress and submitted to the President. Where that contains a phrase that is unambiguous — that has a clearly accepted meaning in both legislative and judicial practice — we do not permit it to be expanded or contracted by the statements of individual legislators or committees during the course of the enactment process.
>
> . . .
>
> Congress could easily have shifted "attorney's fees and expert witness fees," or "reasonable litigation expenses," as it did in contemporaneous statutes; it chose instead to enact more restrictive language and we are bound by that restriction. *Id.* at 1147.

The lesson to be drawn from *WVUH* is that where an item is arguably missing from a statute and that missing item has a commonly understood meaning or usage, the omission will generally be treated as intentional. This is especially true in a case like *WVUH* where a provision for attorney's fees and litigation costs, including expert witness fees, is very likely to address all such interrelated questions in the same place in a statutory scheme if they are addressed at all. In *WVUH*, section 1988 was given its plain meaning even though other interpretations, based on suppositions about legislative intent or considerations of policy, were conceivable.

Under the *WVUH* approach to statutory construction, Title IX's silence on "compensatory, general and punitive" damages is highly significant. As items falling under the general subject of modes of relief or redress, one reasonably could expect these universally familiar remedies to be thought about in conjunction with the development of a general enforcement mechanism under a statute like Title IX (or Title VI). However much the Senate and the House of Representatives as deliberative bodies may hedge in the legislation that they ultimately enact, members of Congress as individuals do not actually think like they legislate. Respondents hope and believe that they think about analytically related issues in a rudimentarily integrated way. This has to be true of the question of remedy because surely every member of Congress understands that laws do not enforce themselves. Therefore, what might seem to Petitioner to be incomplete and ineffective congressional action to enforce Title IX (and Title VI) is ***nevertheless*** the product of choice. Under the reasoning of *WVUH*, legislative choice is to be respected not because courts think that the choice is the best or even a good one,[14] but because courts regard statutory text as the most revealing indicator of legislative intent.

In the other two significant statutory interpretation cases decided in the 1990 Term, the Court dealt with the unforseeable consequences of implying a private right of action.

In *Virginia Bankshares, Inc. v. Sandberg*, ____ U.S. ____, 111 S.Ct. 2749 (1991), the plaintiff sued on an implied right

[14]In *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955), this Court found that regulating one step at a time might well be the preferred legislative approach in a given field. Surely, this approach could make sense in the specific area of remedies where the cost of securing compliance with legislative rules is often hard to predict and the potential for subversion of legislative objectives is potentially significant. The *Bell v. Hood* burden shifting argument collides with the reasoning in this Court's rational basis cases.

of action pursuant to *J.I. Case v. Borak*, 377 U.S. 426 (1964) for what she alleged was a misleading proxy solicitation under section 14(a) of the Securities Exchange Act of 1934. 15 U.S.C. § 78n(a). Because the plaintiff was among a group of minority stockholders whose support was not essential to the effectuation of a merger, the Court in a 5-4 ruling (in the relevant part of the opinion) rejected the attempt to bring the action. Justice Souter noted that the plaintiff's theory of recovery, if recognized, would expand the class of potential plaintiffs under *Borak* to a significant extent. Although recognizing that the answer to the plaintiff's argument rested ultimately on an assessment of congressional intent,[15] he observed:

> [T]he corollary follows that the breadth of the right once recognized should not, as a general matter, grow beyond the scope congressionally intended. *Id.* 111 S.Ct. at 2763.

Justice Souter's brief examination of the traditional materials of legislative history led him to characterize the congressional expression of intent on the scope of section 14(a) as "reticent". In this vein, he noted the troubling fact that Congress was silent about an implied right of action under section 14(a) yet created express causes of actions in three closely related sections of the same Act — §§ 9(e), 16(b) and 18(a). *Id.* at 2764. At this point in *Virginia Bankshares* the inquiry might well have come to an end but for the majority's willingness to consider the issue of equality of status among all section

[15]Justice Souter cited *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979) and noted that it affirmed the primacy of inquiry into legislative intent to determine whether to imply a right of action. He did not address the burden of proof issue explicitly at that point, but a fair reading of *Virginia Bankshares, Inc. v. Sandberg*, ___ U.S. ___, 111 S.Ct. 2749, 2763-2766 (1991) suggests that the burden is on the proponent of expansion of an implied right of action or related remedy. The implications for Petitioner's *Bell v. Hood* burden shifting argument should be ominous.

14(a) implied right of action claimants.[16] Working within the existing framework of implied right of action precedent, *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975), the majority looked to "policy" considerations to judge whether the class of potential section 14(a) plaintiffs ought in fairness to be broadened. On balance, the undesirable consequences of expanding the section 14(a) right of action to include minority shareholders persuaded the majority to leave the law as it stood. The plaintiff therefore did not meet the burden to justify a change in the law.

In *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, ___ U.S. ___, 111 S.Ct. 2773 (1991), the Court had to decide the appropriate statute of limitation for an implied right of action under section 10(b) of the Securities Exchange Act of 1934. When a federal statute is silent on limitation period, the Court's usual practice has been to borrow the most analogous *state* statute of limitation. In *Gilbertson*, however, the Court elected to borrow a statute of limitation from one of the other provisions of the 1934 Act.[17] In discussing its rationale, the Court, *per* Justice Blackmun, dismissed the pretense that Congress ever intended to provide the implied

[16]Justice Souter's structural reasoning, based on the presence of express causes of action elsewhere in the 1934 Act, weighed against the implication of a right of action under section 14(a) in the first place. In this respect, the analytical approach parallels that taken by the majority in *WVUH* and the inference, based on the absence of an express cause of action in section 14(a), also would be the same.

[17]This again is an example of structural reasonsing. The Court looks to functionally related *federal* statutes and examines their limitation periods. In filling out the details of an implied right of action, this methodology, in Respondents' view, is superior to an inquiry into legislative intent. Respondents suggest that if the *Gilbertson* analysis had been applied in evaluating the implied right of action claim in the first place, a legislative solution to the problem would have been forthcoming if one was needed.

remedy. *Id.* at 2780. It also noted in passing how "awkward" it was to try to discern the statute of limitation that "Congress intended courts to apply to a cause of action that it really never knew existed." *Id.*[18]

Yet faced with almost half a century under a remedial scheme of the judiciary's own creation, this Court plainly had no choice in *Gilbertson* but to attempt to tidy up what even two dissenters described as "the often chaotic traditional approach of looking to the analogous state limitation". *Id.* at 2787 (Justice Stevens dissenting, joined by Justice Souter). In *Gilbertson*, there was a note of weariness at having to deal with an issue that would have been settled long ago had Congress legislated and the judiciary refrained. In this respect, *Gilbertson* shares common ground with *Virginia Bankshares*. Neither opinion is a celebration of the virtues of the implied right of action methodology.

In the context of the present case, the lesson to be drawn from *Gilbertson* and *Virginia Bankshares* is evident. Petitioner's demand for the ***judicial expansion*** of remedies under Title IX ought to be rejected with the understanding that nothing beyond equitable relief of the type sought in *Cannon* and *Darrone* will be available in the future. If the actual holding in *Bell v. Hood* (as opposed to what some suggest it means) even faintly suggested a universal presumption in favor of common law damages whenever a federal statute is silent on the subject of remedy, Respondents would ask the Court to overrule that decision. As framed by petitioner, the *Bell v. Hood*

[18]Justice Blackmun was joined in these views by Chief Justice Rehnquist and Justices White, Marshall and Scalia. It would appear that Justices O'Connor and Kennedy agreed with all that Justice Blackmun wrote about implied rights of action and the problems they can spawn; their dissents were prompted by the brevity of the three year federal statute of limitation chosen by the majority (not subject to equitable tolling), *Id.* at 2788-2790, and by its retroactive application to the case at hand. *Id.* at 2785-2788.

presumption is an invention.[18a] The present case offers the occasion to cast it aside.

In a society as intensively regulated as this one, legislative bodies at the national and state levels spend a significant amount of time considering methods of enforcing statutory mandates, including whether to employ: (1) traditional legal and equitable remedies and private enforcement; (2) a remedial scheme that relies on combined private and public enforcement but with less emphasis on the traditional array of common law remedies; or (3) an enforcement scheme predominantly, if not exclusively, under government control. The statutes summarized in Appendix A of this brief offer an insight into the array of enforcement approaches and remedial choices that Congress has enacted into law over the past 30 years. They are varied, sometimes complex; they do *not* routinely include the common law array of damage remedies.

As a corpus of law, however, modern regulatory statutes reflect recognition of the fact that the economic, social and political ramifications of remedial choice can be great. For that compelling reason alone, one can readily understand how lawmakers, who might agree generally about the desirability of a particular political end, can disagree — sometimes vehemently — about the most effective means of bringing it about. If statutes are seemingly incomplete because lawmakers deadlock over enforcement issues, it does not follow that these same lawmakers silently (but consciously) delegate to the judicial branch both the freedom and the responsibility to fill in all the seemingly unresolved details. The *Bell v. Hood* presumption cannot be based on a theory of how legislators actually behave. It is a theory that enables a class of litigants

[18a]In Part III-B of this Brief, Respondents discuss why, in 1964 and in 1972, the presumption would have run counter to a well understood body of immunities law making damages generally unavailable.

to try to turn disappointment or defeat in the legislative process into victory in the courts.

Petitioner's reading of *Bell v. Hood* has extraordinary implications for statutory interpretation. If accepted by this Court, it would invert the respective roles of the Legislative and Judicial Branches in our constitutional structure. The power to establish rights and to create an adequate enforcement mechanism lies with Congress. Likewise, the power to refine, revise and correct defective legislation also lies with Congress. This Court's obligation is to enforce the law as it is written, particularly in the realm of remedial choice which is probably the most political part of the legislative process. Respondents ask this court to reject the argument that Title IX authorizes the recovery of compensatory, general or punitive damages. It is unsupported by the text or structure of Title IX.

B. Recognition of a Damages Remedy Under Title IX in the Face of Statutory Silence Would Undermine Separation of Powers Values Counseling Judicial Respect for Legislative and Executive Branch Primacy in the Formulation of Rights and Remedies

Respondents' arguments for limiting Title IX relief to equitable remedies draws powerful support from separation of powers theory. If the *Bell v. Hood* burden shifting presumption is seen as a silent delegation of legislative authority to the Judicial Branch in the area of formulation of remedy, the premise of *Bell v. Hood* cannot stand. If the Petitioner is shorn of this presumption, then Petitioner — not Respondents — will have to overcome the formidable hurdle of total legislative silence on the question of a Title IX damages remedy. It is a burden that in fairness ought to rest on Petitioner since she seeks to change what was settled law in 1964, if not in 1972

when Title IX was passed.[19] It is a burden that Petitioner does not seem eager to assume.

In two recent decisions, this Court addressed separation of powers challenges involving congressional delegations of power to officials in the Executive and Judicial Branches of government. In *United States v. Touby*, ____ U.S. ____, 111 S.Ct. 1752 (1991), the Court rejected a challenge to a statutory delegation of temporary authority to the Attorney General to add new drugs to (or reclassify within) the schedule of controlled substances banned under the Controlled Substances Act. *Id.* at 1754. In *Mistretta v. United States*, 488 U.S. 361 (1989), the Court rejected a challenge to the Sentencing Reform Act of 1984. The attack was that the Act delegated broad power to a commission within the Judicial Branch to formulate sentencing guidelines ultimately intended to be binding on the federal courts. In both cases, the Court examined the powers actually delegated and the legislative standards governing their execution. It upheld both statutes reasoning in relevant part that:

> So long as Congress "lay[s] down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform, such legislative action is not a forbidden delegation of legislative power." *United States v. Touby*, ____ U.S. ____, 111 S.Ct. 1752, 1756 (1991), quoting from *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928). *See also Mistretta v. United States*, 488 U.S. 361, 372 (1989).

If the *Bell v. Hood* presumption can be conceived as a silent delegation to the Judicial Branch of legislative authority to formulate remedy, Respondents would insist further that it must

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[19] In *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 109 S.Ct. 1981 (1989), the Court noted the principle that, "[a] party contending that legislative action changed settled law has the burden of showing that the legislature intended such a change." *Id.* at 1991. The status of settled law as of 1964 and 1972 is developed in Part III-B of this brief.

also be seen as a *standardless* delegation. The Supreme Court and all lower federal courts are courts of limited jurisdiction. They exercise the authority that the Constitution permits them if and when Congress invokes that authority. Petitioner cannot identify any "intelligible principle" undergirding the *Bell v. Hood* silent delegation of remedial authority. While common law courts of general jurisdiction may have exercised such lawmaking discretion within the realm of the ever shrinking body of common law doctrine, federal courts have functioned under a different set of institutional constraints. *Bell v. Hood's* mythic status in the law should be brought to an end.

A further separation of powers implication of the Petitioner's argument arises from an examination of the Presentment Clause of Article I, Section 7, Clause 2.[20] One consequence of implying a damages remedy nineteen years after the passage of Title IX (and twenty seven years after Title VI) is to deprive the President of the United States of the constitutional right to participate in the lawmaking process. As Respondents have emphasized throughout this brief, the formulation of remedy is inherently political in nature. Even if Congress can agree on the nature of the legal right to be protected, debate over the manner and means of compliance is as important as debate about the underlying right itself. Indeed, the two cannot be separated in a practical sense even though they arguably might be differentiated in other ways. *See Davis v. Passman*, 442 U.S. 228, 239 (1979).

Would President Nixon have signed Title IX into law in 1972 if a provision for compensatory, general and punitive damages had been written into it? Would Title IX have passed Congress in that form? Or even Title VI in 1964? Petitioner's

[20] *Metropolitan Washington Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, ___ U.S. ___. 111 S.Ct. 2298, 2311 (1991); *I.N.S. v. Chadha*, 462 U.S. 919, 944-948 (1983).

burden shifting argument ignores the presidential role in the lawmaking process. In Respondents' view this is a serious flaw. In evaluating the Petitioner's argument generally, we invite the Court's attention to the debate over the Civil Rights Act of 1990, (S. 2104; 101st Cong. 1st Sess). One of the central issues in that debate was Section 8 of the bill which proposed amendment of Section 706(g) of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-5(g)) to allow both ***compensatory*** and ***punitive*** damages against the employer. In his Veto Message of October 22, 1990, President Bush cited the radical alteration of the remedial provisions of Title VII of the Civil Rights Act of 1964.[21] The veto was sustained.

The point is that a President's views on legislation have a bearing on the final product which he must reject or accept as a whole. If the Judicial Branch gives an interpretation to a statute not reasonably drawn from its language, the interpretation undermines the presidential role in lawmaking and exposes those who rely on the statutory language to obligations that could not fairly be anticipated. The Executive Branch, of course, has a major role in Title IX enforcement. A damages remedy, if recognized, will have a significant effect on Executive Branch enforcement capability. The right to recover damages is about as fundamental a statutory right as there is. If it is not written into the statute, the Judicial Branch should not recognize such a right by interpretation. The debate in Congress over the issue[22] now before this Court ought to give serious pause about Petitioner's argument.

[21] Message from the President of the United States, Veto - S. 2104, Civil Rights Act of 1990, p. 2 (October 22, 1990).

[22] The Civil Rights and Women's Equity in Employment Act of 1991, H.R. 1 passed the House of Representatives on June 5, 1991. Section 106 authorizes ***compensatory*** and ***punitive*** damages for intentional discrimination. These issues would be tried by a jury if either party makes a demand. The award of punitive damages is subject to a cap of $150,000 or the sum of compensatory damages plus back pay depending upon which amount is greater.

III. Nothing in the Legislative History of Title IX or Title VI Supports the Remedy of Compensatory, General or Punitive Damages

Petitioner's preferred ground for reversal of the Eleventh Circuit decision in this case is the *Bell v. Hood* burden shifting argument. As a fall back argument, Petitioner makes an argument based on legtislative intent. By addressing this argument, Respondents do not concede that resort to legislative history is a preferred means or, in the context of this case, even a useful guide for settling what is an uncomplicated question of statutory construction. No doubt Petitioner would have developed the legislative history argument more forcefully (and as her primary basis for reversal) if any persuasive evidence of congressional intent existed. Respondents will show, however, that the only evidence from legislative history concerning remedy under Title IX comes from the debate surrounding the enactment of its direct statutory antecedent Title VI. This evidence undercuts the Petitioner's position.

A. Legislative Debate Concerning Remedy

In *Cannon* and *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582 (1983), the litigants had considerable incentive to bring out any facet of the legislative debate surrounding the enactment of Titles IX and Title VI suggesting — even obliquely — the propriety of private enforcement through a damages remedy. If such evidence existed, it would have made *Cannon* an easy case for the Court and *Guardians Ass'n* perhaps a less divisive one. But the reality is that the legislative history of Titles VI and Title IX — as developed in the *Cannon* and *Guardians Ass'n* opinions — reveals little about an implied right of action and *almost* nothing about the further and more consequential issue of an implied damages remedy.

The lone exception to an otherwise opaque legislative record on remedy in 1964 was the proposal by Senators Keating and Ribicoff to establish a private right to enforce Title VI using the injunctive mechanism.[23]

The Senate, however, did not accept this proposal. In Respondents' view, Congress most plausibly intended for funds termination to be the exclusive enforcement mechanism under Title VI (thereby precluding any implied private right to sue for either equitable relief or damages). Although rejected by this Court's rulings in *Cannon* and *Guardians Ass'n*, the argument nevertheless retains force in the context of this case. The Keating-Ribicoff proposal indicates the outer limit of the congressional debate on private enforcement of Title VI[24] Not one word appears to have been uttered by any member of the Senate or the House of Representatives referring to compensatory, general or punitive damages as a possible remedy for Title VI violations. In the face of this silence, one cannot convincingly argue that a majority of Congress (or

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[23]The Keating-Ribicoff proposal was discussed in some detail in Justice White's opinion in *Guardians Ass'n*, 463 U.S. at 600-601.

[24]In fact, much of Jusstice White's opinion in *Guardians Ass'n* was devoted to the significance of Title VI as conditional spending power legislation and to factors limiting successful Title VI plaintiffs to prospective relief only. *Guardians Ass'n v.Civil Serv. Comm'n*, 463 U.S. 582, 595-603 (1983). The facts in *Guardians Ass'n* showed discriminatory impact and not intentional discrimination. The opinion is problematic, however, because it suggests — though it does not and could not hold — that a compensatory remedy might be available where an intentional violation of Title VI is proven. In Respondents' view, Justice White's discussion of prospective relief under Title VI (and by extension Title IX) is persuasive and should apply to all violations intentional or otherwise. Why this discussion ultimately came to the tentative conclusion that prospective relief might be inadequate in cases of intentional discrimination is hard to reconcile with the fact that equitable relief was in 1964 and had been for some time the only remedy used in school desegregation cases throughout much of the nation.

even a single member) consciously desired, much less actively considered, the damages remedy Petitioner now seeks. As far as Respondents have been able to determine, the legislative debate accompanying the passage of Title IX in 1972 did not alter or expand the historical record. The text, structure and apparent meaning of Title IX is drawn entirely from Title VI and is coextensive in scope with it. The case for an implied damages remedy under Title IX thus cannot rest on legislative history.[25]

B. Presumption that Congress Knows Existing Law

Petitioner's legislative intent argument builds on the fiction that the state of the law concerning remedies for statutory violations was so well understood in 1964 and in 1972 that Congress assumed its applicability to the Title VI and Title IX regulatory schemes. In other words, Congress was silent on both the existence of a private right of action and the scope

[25]Legislative history materials are relatively inaccessible to the public at large and that in itself raises questions about the fairness of resorting liberally to such materials as a principal aid to statutory construction or to correct what some might believe to be unintended omissions from a statute. This is particularly true of statutes enacted under the conditional spending power where obligations are undertaken consensually and the reliance interest of public and private institutions is great. Has the federal government ever in its regulations under Title IX (or any analogous statute) stated that recipients of federal financial assistance take the assistance with the understanding that they are subject to private damages actions for discrimination? Has the federal government ever provided such notice in grant contracts or official documents associated with the distribution of federal financial assistance? As far as Respondents can determine, the answer to both questions is no. Yet, twenty-seven years after the enactment of Title VI and nineteen years after the enactment of Title IX, this Court is asked to announce the unearthing of a long neglected but preexisting damages remedy that may well be retroactively applicable. *James B. Beam Distilling Co. v. Georgia*, ____ U.S. ____, 111 S.Ct. 2439 (1991).

of remedy because it knew that judge-made law would fill in the gaps.[26] For several reasons, the argument is unpersuasive.

If one examines the implied right of action cases decided by this Court up to 1964, they do not hold, much less suggest, a universalist view that all statutory rights recognized by implication are automatically enforceable to the same extent and by means of the same remedial mechanism that would apply in a common law tort action.[27] In fact, the configuration in these cases was private litigant versus private litigant, and the rights of action implied came in areas where Congress' power to regulate was well established. Moreover, in at least four cases, there was a parallel between the right implied and a counterpart right in the law of torts.[28] For these reasons, it is understandable that federal judges prior

[26]This argument is twice removed from the actual text of Title IX. When a court examines legislative history, it uses secondary evidence since it looks outside the text of the statute. When a court applies the presumption that Congress is knowledgeable about the law, it goes further afield from the text of the statute and makes two key assumptions, one of which cannot be refuted: (1) its own description of the law at a given point in time is accurate and refers to a body of law that was primarily relevant to the legislative debate; and (2) Congress' actual understanding of the law was the same as that which the court describes. At some point in this process, meaning is not something that inheres in the language of a statute.

[27]*Calhoun v. Harvey*, 379 U.S. 134 (1964); *J.I.Case v. Borak*, 377 U.S. 426 (1964); *Weldin v. Wheeler*, 373 U.S. 647 (1963); *Machinists v. Central Airlines*, 372 U.S. 682 (1963); *T.I.M.E., Inc. v. United States*, 359 U.S. 464 (1959); *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246 (1951); *Bell v. Hood*, 327 U.S. 675 (1946); *Deckert v. Independence Shares Corp.*, 311 U.S. 282 (1940); *Texas and Pacific R. Co. v. Rigsby*, 241 U.S. 33 (1916).

[28]*J.I. Case v. Borak*, 377 U.S. 426 (1964); *Bell v. Hood*, 327 U.S. 675 (1946); *Deckert v. Independence Shares Corp.*, 311 U.S. 282 (1940); *Texas and Pacific R. Co. v. Rigsby*, 241 U.S. 33 (1916).

to 1964 might have undertaken a strong role in the recognition of implied statutory rights and the fashioning of appropriate remedies to enforce those rights. It was a role that may have been familiar to them and one that state court judges exercising common law powers would not have found unusual.

The question is whether this is the relevant body of case law for purposes of gleaning congressional intent on *implied remedy* as of 1964 when Title VI was passed. Respondents think not. None of the pre-1964 implied right of action cases dealt with the very different and more difficult question of the enforcement of implied statutory right of action claims against government — national, state or local — or against a private person or entity whose conduct might fall outside of Congress' constitutionally established regulatory power. This point is important because, then as now, the absolute number of federal funding recipients that are public in nature must exceed, perhaps greatly, those which are private. If anyone in the 88th Congress actually thought about the implied right of action cases in deciding how to vote on Title VI (or Title IX in 1972), would not Eleventh Amendment sovereign immunity or the rule of municipal immunity in section 1983 cases have had a major bearing on the choice of remedial scheme?[29] Even cursory consideration of the well recognized law of government immunity in 1974 would have suggested the truly revolutionary nature of a Title VI damages remedy and would have provoked intense discussion of any such proposal if advanced seriously.[30]

[29]*See, e.g., Monroe v. Pape*, 365 U.S. 167 (1961); *Ex Parte Young*, 209 U.S. 123 (1908). So strong was the policy against imposing federal liability on state and local government that the antitrust liability of municipalities was not clearly established until *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978), the same year *Monroe v. Pape* was overruled in *Monell*. Note that local government antitrust *immunity* was reestablished in 1984, 15 U.S.C. §§ 34-36 (1988).

[30]Not only would this have changed fundamental case law on immunity, it would have had immediate and potentially enormous financial implications.

C. Litigation of Title VI Cases 1964-1972

Judicial decisions between 1964 and 1972 do not bolster Petitioner's argument that the full panoply of common law damage remedies were a part of Title VI when originally enacted or the recognized law of the law land by 1972 when Title IX was passed. Respondents have found 56 lower court cases between 1964 and 1972 in which Title VI appears to have been a basis for the exercise of federal jurisdiction. These cases are listed in Appendix B. Virtually all of these cases involve an agency of local government as a defendant, most being school systems. In 14 of these cases, section 1983 provided a parallel basis for the exercise of federal jurisdiction. During this time period, section 1983, of course, permitted the award of both damages and equitable relief for constitutional violations, but, under this Court's ruling in *Monroe v. Pape*, 365 U.S. 167 (1961) did not authorize the recovery of damages against an entity of local government. In none of these cases did the plaintiff request under Title VI the type of damages that Petitioner now seeks as part of her Title IX claim. Equitable relief was, in fact, the only relief that any of the plaintiffs ever appears to have sought.[31] Recalling that these plaintiffs allegedly

Bear in mind that school desegregation litigation was at its height during this era. Many cases involved challenges to *de jure* segregation. If Petitioner's argument is accepted, it would mean the Congress of 1964 willingly accepted, or at least accepted the possibility of, a common law damages remedy on behalf of all school students who were the victims of such *de jure* segregation. *Bell v Hood* notwithstanding, Respondents doubt that anyone had that possibility in mind in 1964, much less desired to bring the outcome about legislatively.

[31]*Rolfe v. County Bd. of Educ.*, 282 F. Supp. 192 (E.D. Tenn. 1966), *aff'd*, 391 F.2d 77 (6th Cir. 1968) is cited by the Petitioner as presumably the leading case between 1964 and 1972 supporting the claim that "damages" has always been a part of the Title VI remedial scheme. If *Rolfe* was a part of the "clear, contemporaneous body of law, in an area of statutory interpretation that would obviously been of keen interest to Congress," Pet. Br. at 25, it appears to have been overlooked in the

were victims of intentional race discrimination, it is difficult to imagine a strategic rationale common to all of these cases that would explain the absence of damage demands for emotional injury (general) and for deterrence of wrongdoers (punitive).The most probable explanation for this pattern is the most obvious one: Congress, in fact, did not write Title VI or Title IX conferring a damages remedy on anyone.

D. Rationale for Preferring Equitable Relief Over Damages

Because of governmental and official immunities, equitable relief has always been more prominent than damages as a remedy in litigation in which a governmental agency or an official of such an agency is a defendant. For several reasons, the Court should reject Petitioner's contention that anything less than full common law damages under Title IX would constitute an injustice.

First, since Title IX, like Title VI, is based on the conditional spending power, Congress and particularly the federal oversight agencies have an obligation to make clear in advance

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legislative debate leading up to the enactment of Title IX in 1972. More important, the remedy awarded in *Rolfe* — despite the inapt use of the "damages" terminology — is clearly patterned after the remedial scheme established in Title VII which explicitly characterizes back pay as equitable in nature. *Rolfe* provides no support for the contention that Title VI, much less Title IX, includes a right to recover "compensatory, general and punitive" damages. To put this matter into a more contemporary perspective, the Court should recall its reasoning in *Consolidated Rail Corp. v. Darrone*, 465 U.S.624, 630 n. 9 (1984), a case that arose under section 504 of the Rehabilitation Act of 1973, another statute banning discrimination in a program receiving federal financial assistance. The distinction between monetary damages and back pay — or between legal and equitable remedies — was an important factor in the decision to uphold the Darrone claim.

the responsibilities that a recipient of federal funds assumes.[32] It is one thing to have a prohibition on sex discrimination and a statutory procedure for terminating funding. All recipients of federal funds have notice of that. It is something quite different, however, to permit juries to impose the full array of common law damage sanctions when that consequence is never discussed, much less agreed to, by the recipient. After twenty seven years of regulation under Title VI and nineteen years under Title IX without legislative or judicial imposition of a damages remedy, the reliance interest of recipient institutions, both public and private, ought to weigh heavily against Petitioner's argument.

Second, equitable relief is actually superior to the damages remedy in promoting all federal interests at stake in the Title IX context. Significantly, it permits a more sensitive and financially reasonable balancing of the recipient institution's educational goals with the individual's right to administer, teach or learn in an environment free of sexual harassment or other forms of sex discrimination. The aim of equitable relief under Title IX is primarily to eliminate the offending policy or practice and to deal with the persons behind it. But if purely prospective relief does not go far enough, equitable relief can even be employed to require a school system to make counseling

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[32]In *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1 (1981), the Court held that when Congress imposed obligations under the conditional spending power, it must state the conditions under which the federal money and hence the legal obligation is assumed. The same reasoning ought to apply in the case of Title IX since the burden of defending damages actions and paying judgments is a financial burden of significance. *Id.* at 23-25. Describing the relationship between the federal government and the state as a "contract," the Court in *Pennhurst* observed: "There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Id.* 17. Respondents suggest that Title IX's silence on the damages remedy falls well short of the notice requirement established in *Pennhurst*.

or remedial instruction available to a student if needed to overcome any educational disadvantage resulting from the discrimination.[33]

Though Petitioner minimizes it,[34] the goal of restoring a student to an educational environment where he or she can make reasonable academic progress in the future is a worthy one. That goal of tailored relief was in fact achieved in the present case. The school system responded well before a lawsuit was filed. Every remedial step taken on Petitioner's behalf within the school system, including the establishment of a Title IX grievance procedure, and every remedial dollar spent went *directly* to protect and promote her right as a student to be free of sexual victimization. As far as the relative virtues and merits of equitable relief under Title IX are concerned, it is highly significant that remedial benefits to the aggrieved student can and frequently will benefit others in the educational environment as well.[35]

Finally, contrary to Petitioner's view, equitable relief has substantial deterrent effect. Any empirical assesment of this

[33]This could include tutoring if a student's grades dropped or her academic performance suffered due to being sexually victimized. If psychological problems resulted that might hamper a student's ability to make satisfactory academic progress in the future, the school system could provide necessary counseling and therapy, in many instances through the use of its own professional staff. As this Court has recognized, compliance with equitable remedies can require the expenditure of public funds sometimes in an amount that is quite significant. In *Missouri v. Jenkins*, 493 U.S. ____, 110 S.Ct. 1651 (1990), the Court held that a federal district court can require a local government to levy taxes to bring a school system into compliance with a school desegregation decree.

[34]Petitioner asserts that the choice is either "damages or nothing". Pet. Brief at 32.

[35]The grievance procedure worked to the benefit of all students. Also the resignations of Hill and perhaps Prescott rid the school system of two individuals who allegedly had victimized female students or were willing to tolerate such conduct.

claim inevitably has a speculative dimension. A more precise and perhaps more illuminating phrasing of this question might be: whether the deterrent effect of a Title IX damage award is appreciably superior to the regulatory benefits, including deterrence, of Title IX administrative oversight supplemented by equitable relief? As far as administrative oversight is concerned, there can be no doubt that the *general* threat of funding termination is *intended* to encourage good faith compliance with Title IX by all recipients of federal financial assistance. There also can be no doubt that a *specific* threat of funding termination (complete or partial) is likewise *intended* to correct conditions or to penalize conduct that violates Title IX. On the whole, there is a significant potential for deterrence inherent in the structured mechanism for enforcement of Title IX. Not to be overlooked in this vein is the fact that equitable relief under Title IX ultimately is backed by the trial judge's exercise of the contempt sanction.

It is difficult, therefore, to understand how the Petitioner can characterize this structured enforcement mechanism as *less effective* than a damages remedy in deterring Title IX violations. Or as *not effective* at all. Both schemes deter. The damages remedy, however, operates far more randomly and with less precision than equitable relief. Its ultimate appeal lies not in its quality as a deterrent but predominantly in its impact as a purely punitive measure. Damages, after all, does provide a type of personal vindication that equitable relief generally cannot match. However much the Petitioner might *prefer* the damages remedy with its presumed superiority as a deterrent to Title IX violations, the fact remains that its weaknesses much overshadow its benefits. In any event, as the very nature of this discussion reveals, the scope of the Title IX remedy is a matter that ought to be taken up by that Congress.

CONCLUSION

Respondents ask the Court to reject Petitioner's attempt to enlarge the remedies under Title IX to include damages in any form. The judgment of the United States Court of Appeals for the Eleventh Circuit should be affirmed.

Respectfully submitted,

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APPENDIX A

Act	Equitable Relief	Compensatory Damages	Punitive Damages	Court Costs and/or Attorney Fees	Right to Sue Gov't and/or Subdivisions	Private Cause of Action
Americans With Disabilities Act of 1990 42 U.S.C. § 12117	Express Mention	No Mention	No Mention	Yes	Yes	Yes
42 U.S.C. § 12133	Express Mention	No Mention	No Mention	Yes	Yes	Yes
42 U.S.C. § 12188	Express Mention	"Monetary Damages" (When Requested by Attorney General)	Express Ban	No Mention	Yes	Yes

Act	Equitable Relief	Compensatory Damages	Punitive Damages	Court Costs and/or Attorney Fees	Right to Sue Gov't and/or Subdivisions	Private Cause of Action
Civil Rights Act of 1964 Title II (Public Accommodations) 42 U.S.C. § 2000a *et seq.*	Express Mention	No Mention	No Mention	Yes	Yes	Yes
Title VII (Equal Employment Opportunities 42 U.S.C. § 2000e *et seq.*	Express Mention "Backpay"	No Mention	No Mention	Yes	Yes	Yes

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Act	Equitable Relief	Compensatory Damages	Punitive Damages	Court Costs and/or Attorney Fees	Right to Sue Gov't and/or Subdivisions	Private Cause of Action
Clean Air Act 42 U.S.C. § 7401 *et seq.*	Express Mention (May require bond)	No Mention	No Mention	Yes	Yes	Yes
Consumer Product Safety Act 15 U.S.C. § 2051 *et seq.*	Express Mention	Express Mention (knowing violation)	"Civil and Criminal Penalties"	Yes	Yes	Yes

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Act	Equitable Relief	Compensatory Damages	Punitive Damages	Court Costs and/or Attorney Fees	Right to Sue Gov't and/or Subdivisions	Private Cause of Action
Education of Handicapped 20 U.S.C. § 1400 *et seq.*	No Mention	No Mention	No Mention	Yes	Yes	Yes
Emergency Planning & Community Right to Know 42 U.S.C. 11001 *et seq.*	Express Mention	No Mention	"Civil and Criminal Penalties"	Yes	Yes	Yes

Act	Equitable Relief	Compensatory Damages	Punitive Damages	Court Costs and/or Attorney Fees	Right to Sue Gov't and/or Subdivisions	Private Cause of Action
Energy Policy Conservation Act 42 U.S.C. § 6291 *et seq.*	Express Mention	No Mention	No Mention	Yes	Yes	Yes
Fair Credit Reporting Act 15 U.S.C. § 1681 *et seq.*	No Mention	Yes (for negligent & willful non-compliance)	Yes (for willful non-compliance)	Yes	No	Yes

Act	Equitable Relief	Compensatory Damages	Punitive Damages	Court Costs and/or Attorney Fees	Right to Sue Gov't and/or Subdivisions	Private Cause of Action
Fair Housing Act 42 U.S.C. § 3601 *et seq.*	Express Mention	Express Mention	Express Mention	Yes	No	Yes
Federal Tort Claims Act 28 U.S.C. § 2671 *et seq.*	No Mention	Express Mention	Ban on punitives (one exception)	Yes	Yes	Yes

Act	Equitable Relief	Compensatory Damages	Punitive Damages	Court Costs and/or Attorney Fees	Right to Sue Gov't and/or Subdivisions	Private Cause of Action
Federal Water Polution Control Act 33 U.S.C. § 1251 *et seq.*	Express Mention	No Mention	No Mention	Yes	Yes	Yes
Freedom of Information Act 5 U.S.C. § 552 *et seq.*	Express Mention	No Mention	No Mention	Yes	Yes	Yes

Act	Equitable Relief	Compensatory Damages	Punitive Damages	Court Costs and/or Attorney Fees	Right to Sue Gov't and/or Subdivisions	Private Cause of Action
Hazardous Liquid Pipeline Safety Act 49 App. § 2001 *et seq.*	Express Mention	No Mention	Yes (In action brought by Attorney General	Yes	Yes	Yes
Marine Protection, Research, & Sanctuaries 33 U.S.C. § 1401 *et seq.*	Express Mention	No Mention	Civil and Criminal Penalties up to $50,000	Yes	Yes	Yes

Act	Equitable Relief	Compensatory Damages	Punitive Damages	Court Costs and/or Attorney Fees	Right to Sue Gov't and/or Subdivisions	Private Cause of Action
National Historic Preservation Act 16 U.S.C. § 470 *et seq*	Yes (Implied by courts)	No Mention	No Mention	Yes	Yes	Yes (Implied by courts
Noise Control Act of 1972 42 U.S.C. § 4901 *et seq*	Express Mention	No Mention	No Mention	Yes	Yes	Yes

Act	Equitable Relief	Compensatory Damages	Punitive Damages	Court Costs and/or Attorney Fees	Right to Sue Gov't and/or Subdivisions	Private Cause of Action
Ocean Thermal Energy Conservation Act of 1980 42 U.S.C. § 9101 *et seq.*	Express Mention	No Mention	No Mention	Yes	Yes	Yes
Outer Continental Shelf Lands Act 43 U.S.C. § 1331 *et seq*	Express Mention (may require bond)	Express Mention	No Mention	Yes	Yes	Yes

Act	Equitable Relief	Compensatory Damages	Punitive Damages	Court Costs and/or Attorney Fees	Right to Sue Gov't and/or Subdivisions	Private Cause of Action
Powerplant & Industrial Fuel Use Act of 1978 42 U.S.C. § 8301 *et seq.*	Express Mention	No Mention	No Mention	Yes	Yes	Yes
Privacy Act of 1974 5 U.S.C. § 552 *et seq.*	Express Mention	Yes (for willful & intentional violations	No Mention	Yes	Yes	Yes

Act	Equitable Relief	Compensatory Damages	Punitive Damages	Court Costs and/or Attorney Fees	Right to Sue Gov't and Subdivisions	Private Cause of Action
Racketeer Influenced and Corrupt Organizations (RICO) 18 U.S.C. § 1961 *et seq.*	Express Mention	Yes (treble damages)	No Mention	Yes	No	Yes
Safe Drinking Water Act 42 U.S.C. § 300f *et seq.*	Express Mention (may require bond)	No Mention	No Mention	Yes	Yes	Yes

Act	Equitable Relief	Compensatory Damages	Punitive Damages	Court Costs and/or Attorney Fees	Right to Sue Gov't and Subdivisions	Private Cause of Action
Surface Mining Control and Reclamation Act of 1977 30 U.S.C. § 1201 *et seq.*	No Mention	Yes ("May sue for damages")	No Mention	Yes	Yes	Yes

Act	Equitable Relief	Compensatory Damages	Punitive Damages	Court Costs and/or Attorney Fees	Right to Sue Gov't and Subdivisions	Private Cause of Action
Tax Equity & Fiscal Responsibility Act of 1982 26 U.S.C. § 7421 *et seq.*	Express Mention	Yes ("Civil Damages")	Yes (unauthorized disclosure of returns — willful violations	Yes	Yes	Yes
Toxic Substance Control Act 15 U.S.C. § 2601 *et seq.*	Express Mention	No Mention	No Mention	Yes	Yes	Yes

APPENDIX B

Lower Court Cases Between 1964 and 1972 Involving Title VI Claims; Chart Shows the Relief Sought by the Plaintiffs

NOTE: Asterik (*) Denotes Cases With a Parallel 42 U.S.C. § 1983 Claim. Subsequent Case History Does NOT Include Denials of Certiorari By United States Supreme Court.

Bradley v. School Bd. of City of Richmond, Va., 472 F.2d 318 (4th Cir. 1972) (Declaratory)

Johnson v. Combs, 471 F.2d 84 (5th Cir. 1972) (Injunctive; Attorneys' fees)

Duhart v. Carlson, 469 F.2d 471 (10th Cir. 1972) (Declaratory; Injunctive; Mandamus)

**Allen v. Mississippi Commission of Law Enforcement*, 424 F.2d 285 (5th Cir. 1970) (Declaratory; Injunctive)

Chambers v. Iredell County Bd. of Ed., 423 F.2d 613 (9th Cir., 1970) (Injunctive)

Henry v. Clarksdale Municipal Separate School Dist., 409 F.2d 682 (5th Cir. 1969) (Injunctive)

Taylor v. Cohen, 405 F.2d 277 (4th Cir. 1968) (Injunctive)

Board of Public Instruction of Duval County, Fla. v. Braxton, 402 F.2d 900 (5th Cir. 1968) (Injunctive)

**Smith v. Board of Com'rs. of District of Columbia*, 380 F.2d 632 (D.C. Cir. 1967) (Declaratory; Injunctive)

**Kelly v. Altheimer, Ark. Public School Dist.No. 22*, 378 F.2d 483 (8th Cir. 1967) (Injunctive)

**Cypress v. Newport News General and Nonsectarian Hospital Ass'n.*, 375 F.2d 648 (4th Cir. 1967) (Injunctive)

Smith v. Board of Ed. of Morrilton School Dist. No. 32, 365 F.2d 770 (8th Cir. 1966) (Injunctive; Back pay)

Davis v. Board of School Com'rs of Mobile County, 364 F.2d 896 (5th Cir. 1966) (Injunctive)

Singleton v. Jackson Municipal Separate School Dist. 355 F.2d 865 (5th Cir. 1966) (Injunctive)

Kemp v. Beasley, 352 F.2d 14 (8th Cir. 1965) (Injunctive; Attorneys' fees)

Adams v. Richardson, 351 F. Supp. 636 (D.D.C. 1972), aff'd in part and modified in part, 480 F.2d 1159 (D.C. Cir. 1973) (Declaratory; Injunctive)

Serna v. Portales Municipal Schools, 351 F. Supp. 1279 (D.N.M. 1972) *aff'd*, 499 F.2d 1147 (10th Cir. 1974) (Declaratory; Injunctive)

Medley v. School Bd. of City of Danville, Va. 350 F. Supp. 34 (W.D. Va. 1972), *remanded*, 482 F.2d 1060 (5th Cir. 1973) (Declaratory; Injunctive)

Cook v. OSHNER Foundation Hospital, 61 F.R.D. 354 (E.D. La. 1972) (Declaratory; Injunctive)

Bassett v. Atlanta Independent School District, 347 F. Supp. 1191 (E.D. Tex. 1972), *rev'd*, 485 F.2d 1268 (5th Cir. 1973) (Injunctive; Back pay)

Linker v. Unified School Dist. No. 259, Wichita, Kan., 344 F. Supp. 1187 (D. Kan. 1972) (Injunctive)

Coleman v. Humphreys County Memorial Hospitals, 55 F.R.D. 507 (N.D. Miss. 1972) (Injunctive)

Wolman v. Essex, 342 F. Supp. 399 (S.D. Ohio 1972), *aff'd*, 409 U.S. 808 (1972), *vacated*, 421 U.S. 982 (1975) (Declaratory; Injunctive)

Joyner v. Whiting, 341 F. Supp. 1244 (M.D.N.C. 1972), *rev'd* 477 F.2d 456 (4th Cir. 1973) (Declaratory; Injunctive)

Lemon v. Sloan, 340 F. Supp. 1356 (E.D. Pa. 1972), *aff'd*, 413 U.S. 825 (1973) (Declaratory)

Bradley v. School Bd. of City of Richmond, Va., 338 F. Supp. 67 (E.D. Va. 1972), *rev'd*, 462 F.2d 1058 (5th Cir. 1972) (Declaratory; Injunctive)

Southern Christian Leadership Conference, Inc. v. Connolly, 331 F. Supp. 940 (E.D. Mich. 1971) (Declaratory)

Long v. Board of Ed. of City of St. Louis, 331 F. Supp. 193 (E.D. Mo. 1971), *aff'd*, 456 F.2d 1058 (8th Cir. 1972) (Injunctive; Back pay)

Goodwin v. Wyman, 330 F. Supp. 1038 (S.D.N.Y. 1971), *aff'd*, 406 U.S. 964 (1972) (Declaratory; Injunctive)

North Philadelphia Community Bd. v. Temple University of Commonwealth System of Higher Ed., 330 F. Supp. 1107 (E.D. Pa. 1971) (Declaratory; Injunctive; (Back pay))

Norris v. State Council of Higher Ed. for Va., 327 F. Supp. 1368 (E.D. Va. 1971), *aff'd*, 404 U.S. 907 (1971) (Injunctive)

Cisneros v. Corpus Christi Independent School Dist., 324 F. Supp. 599 (S.D. Tex. 1970), *aff'd in part and modified in part*, 467 F.2d 142 (5th Cir. 1972) (Injunctive)

Johnson v. Sanders, 319 F. Supp. 421 (D. Conn. 1970) (Declaratory; Injunctive)

Bradley v. School Bd. of City of Richmond, Va., 317 F. Supp. 555 (E.D. Va. 1970) (Injunctive)

Scott v. Winston-Salem/Forsyth County Bd. of Ed., 317 F. Supp. 453 (M.D.N.C. 1970), *aff'd in part and vacated in part*, 444 F.2d 99 (4th Cir. 1971) (Injunctive)

DiCenso v. Robinson, 316 F. Supp. 112 (D.R.I. 1970), *aff'd* 403 U.S. 602 (1971) (Declaratory; Injunctive)

Green v. Kennedy, 309 F. Supp. 1127 (D.D.C. 1970) (Injunctive)

U.S. v. Tatum Independent School Dist., 306 F. Supp. 285 (E.D. Tex. 1969) (Injunctive)

Parker v. Tangipahoa Parish School Bd., 299 F. Supp. 421 (E.D. La. 1969) (Declaratory)

**Marable v. Alabama Mental Health Bd.*, 297 F. Supp. 291 (M.D.Ala. 1969) (Declaratory; Injunctive)

Coffey v. State Educational Finance Commission, 296 F. Supp. 1389 (S.D. Miss. 1969) (Injunctive)

U.S. by Clark v. Elloree School Dist. No. 7, Orangeburg County, S.C., 283 F. Supp. 557 (D.S.C. 1968) (Declaratory; Injunctive)

Moses v. Washington Parish School Bd., 276 F. Supp. 834 (E.D. La. 1967) (Declaratory; Injunctive)

Teel v. Pitt County Bd. of Ed., 272 F. Supp. 703 (E.D.N.C. 1967) (Injunctive)

Hobson v. Hansen, 269 F. Supp. 401 (E.D.N.C. 1967), *aff'd and remanded*, 408 F.2d 175 (D.C. Cir. 1969) (Declaratory; Injunctive)

Betts v. County School Bd. of Halifax County, Va., 269 F. Supp. 593 (W.D. Va. 1967) (Injunctive)

Alabama NAACP State Conference v. Wallace, 269 F. Supp. 346 (M.D. Ala. 1967) (Declaratory; Injunctive)

**Wall v. Stanly County Bd. of Ed.*, 259 F. Supp. 238 (M.D.N.C. 1966), *rev'd*, 378 F.2d 275 (4th Cir. 1967) (Injunctive)

**Miller v. School Dist. No. 2, Clavendon County, S.C.*, 253 F. Supp. 552 (D.S.C. 1966) (Injunctive)

**Thompson v. Housing Authority of City of Miami, Fla.*, 251 F. Supp. 121 (S.D. Fla. 1966) (Injunctive)

Wright v. County School Bd. of Greenville County, Va., 252 F. Supp. 378 (E.D. Va. 1966) (Injunctive; Attorney's fees)

Thompson v. County School Bd. of Hanover County, Va., 252 F. Supp. 546 (E.D. Va. 1966) (Injunctive)

Turner v. County School Bd. of Goochland County, Va., 252 F. Supp. 578 (E.D. Va. 1966) (Injunctive)

Kier v. County School Bd. of Augusta County, Va., 249 F. Supp 239 (W.D. Va. 1966) (Injunctive)

Trahan v. Lafayette Parish School Bd., 244 F. Supp. 583 (W.D. La. 1965) (Injunctive)

**Smith v. Hampton Training School for Nurses*, 243 F. Supp. 403 (E.D. Va. 1965), *rev'd*, 360 F.2d 577 (4th Cir. 1966) (Injunctive; Back pay)